87-1573

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIE B. KILGORE, DORIS McCONNELL
AND PATSY BURCHETT,

Cross-Petitioners,

V.

COMMONWEALTH OF VIRGINIA, ex rel.
STATE BOARD OF ELECTIONS,
KATHERINE JONES McCLELLAND,
FAYE OWENS, ROGER ADAMS, EVELYN BACON,
PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA,
the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC
INSURANCE COMPANY, and the COMPASS INSURANCE
COMPANY,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHEN INSURANCE EXISTS TO COVER A LOSS AND THE STATE BEING SUED ACQUIESCED TO A RULING THAT BACK PAY WAS RECOVERABLE, DOES THE ELEVENTH AMENDMENT STILL BAR THE AWARD OF MONETARY RELIEF TO INDIVIDUALS WRONGFULLY DISCHARGED FROM THEIR EMPLOYMENT?

II. AFTER THE ESTABLISHMENT OF THE BRANTI TEST FOR PATRONAGE DISCHARGES, CAN A COURT GRANT QUALIFIED IMMUNITY TO AN EMPLOYER WHO DID NOT EVEN ASSERT THAT PARTY AFFILIATION WAS A NECESSARY JOB REQUIREMENT JUST BECAUSE NO PRECEDENT INVOLVED THE FIRINGS OF VOTER REGISTRARS AND ASSISTANT REGISTRARS?

III. ARE VOTER REGISTRARS AND ASSISTANT REGISTRARS STATE EMPLOYEES WHEN THE VIRGINIA GENERAL ASSEMBLY ESTABLISHED A BIFURCATED SYSTEM WHERE BOTH STATE AND LOCAL GOVERNMENTS EXERCISE CONTROL?

LIST OF PARTIES REQUIRED PURSUANT TO SUPREME COURT RULE 21.1(b)

The appellants in the court below were Scott County Electoral Board members Katherine McClelland, Faye Owens and Herman Stallard; Lee County Electoral Board members Roger Adams, Evelyn Bacon and Judy Carroll; Lee County General Registrar Phillip Cheek; the Commonwealth of Virginia, ex rel. State Board of Elections; and the Compass Insurance Company.

The appellees in the court below were Willie B. Kilgore, Doris McConnell and Patsy Burchett (plaintiffs in the district court). The remaining parties who were appellants/ appellees in the court below were the County of Lee, Virginia; the County of Scott, Virginia; and the Republic Insurance Company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

STATUTES

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

WILLIE B. KILGORE, DORIS McCONNELL
AND PATSY BURCHETT

CROSS-
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STATE BOARD OF ELECTIONS,
KATHERINE JONES McCLELLAND,
FAYE OWENS, ROGER ADAMS, EVELYN BACON,
PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA,
the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC
INSURANCE COMPANY, and the COMPASS INSURANCE
COMPANY

CROSS-
RESPONDENTS.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Cross-Petitioners Willie B. Kilgore, Doris McConnell and Patsy Burchett respectfully cross-petition this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit for the following reasons.

REFERENCE TO OPINIONS

The opinions and orders of the United States District Court for the Western District of Virginia, Big Stone Gap Division, are reported at 637 F. Supp. 1241 (W.D. Va. 1985); 637 F. Supp. 1249 (W.D. Va. 1985); and 637 F. Supp. 1253 (W.D. Va. 1986). See also Petitioner's Appendix, "P.A.", at A-27.

The opinion of the United States Court of Appeals for the Fourth Circuit affirming in part and reversing in part the district court's judgment is reported at 829 F.2d 1319 (4th Cir. 1987). See also P.A. at A-1. The order denying plaintiffs'/appellees' Petition for Rehearing and Suggestion for Rehearing En Banc was filed November 19, 1987. See P.A. at A-25. The order of the United States Court of Appeals for the Fourth Circuit denying temporary injunctive relief is set forth verbatim in Cross-Petitioners' Appendix, "C.P.A." at A-1.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered the order denying plaintiffs'/ appellees' Petition for Rehearing and Suggestion for Rehearing En Banc on November 19, 1987.

This Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit is filed under Supreme Court Rule 19.5, and reliance is hereby made upon that rule. The Respondents and Cross-Petitioners Kilgore, McConnell and Burchett are filing this Cross-Petition in connection with the Petition for Certiorari filed by the Petitioner, Commonwealth of Virginia, ex rel. State Board of Elections, No. 87-1424. Kilgore, McConnell and Burchett received the Petition for Certiorari on February 18, 1988.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are set forth verbatim in P.A. at A-70: Constitution of the United States - Amendment I; Va. Code §§ 24.1-29, 24.1-30, 24.1-32, 24.1-35, 24.1-43, 24.1-44, 24.1-45, 24.1-45.1, 24.1-46, 24.1-49, 24.1-55.1, 24.1-55.2, 24.1-56, 24.1-105, 24.1-106, 24.1-203, 24.1-228.1, 24.1-229, 24.1-230, 24.1-231, 24.1-232.

These additional constitutional provisions and statutes are set forth verbatim in C.P.A. at A-13: Constitution of the United States - Amendment XI; Va. Code § 24.1-19.

STATEMENT OF CASE

On March 1, 1983, Republicans Willie Kilgore and Doris McConnell served as General Registrar of Voters in Scott County and Lee County, Virginia, respectively. Pasty Burchett served as Assistant General Registrar in Lee County. McConnell had ten years experience as general registrar while Kilgore had four years experience.

Local county electoral boards appoint the general registrar and in turn, the general registrar appoints the assistant registrar. Va. Code §§ 24.1-43 and 24.1-45.

When the Democrats gained control of the governorship in 1982, composition of the local boards was set to change from a Republican majority to a Democratic majority. In March of 1983, Kilgore and McConnell also were scheduled for reappointment.

The Republican board's term expired "on" March 1, 1983 and Virginia law required the

appointment of a general registrar during the first week of March. Both Republican Boards met on March 1, 1983, and reappointed Kilgore and McConnell. Later, the Democratic boards convened meetings and appointed Democrats to serve as general registrars. Because of this sequence of events, the Virginia General Assembly altered the statute to end an "outgoing" board's term on midnight, the last day of February.

The Democratic board members did not consider Kilgore and McConnell even though the boards knew Kilgore and McConnell wanted to retain their positions. In Kilgore's case, the Democratic members had not heard complaints on Kilgore's job performance.

Burchett worked as Lee County Assistant Registrar for more than four years. At the time the Democratically controlled Lee County Electoral Board failed to rehire McConnell, Virginia law did not require the term of the assistant registrar to coincide with the

general registrar's term. When the Democrat assumed the general registrar's office in Lee County, he advised Burchett that he did not consider her to be his employee. The Democratic registrar then hired the former chairman of the Lee County Democratic Party to serve as an unpaid assistant registrar. In a few months, the Democratic registrar hired a paid assistant whose husband served as a Democratic precinct worker.

After the wholesale firings, Kilgore, McConnell and Burchett filed suits under 42 U.S.C. § 1983 alleging the local electoral boards and the Lee County Registrar infringed on their first amendment rights of free speech and association. Jurisdiction was based on 28 U.S.C. § 1331.

Prior to the Democratic appointees assuming office, Kilgore and McConnell sought preliminary injunctions to restore them to office pending a trial on the merits. The district court denied the motion but certified the denial for an immediate

interlocutory appeal pursuant to 28 U.S.C. § 1292 (b). On April 1, 1983, the Fourth Circuit Judge Emory Widener heard this appeal and affirmed the district court denial. Judge Widener ruled that Kilgore and McConnell would receive their lost salary and benefits if they prevailed. The Commonwealth of Virginia opposed the injunction and did not object to this order. See C.P.A. at A-1. Relying on this precedent, Burchett did not seek preliminary injunction to remain assistant registrar pending a trial on the merits.

All three cases went to a jury during the summer of 1985. All three juries found that the defendants refused to reappoint the plaintiffs "solely because of [their] political affiliation." The juries awarded Kilgore and McConnell approximately $75,000 each and Burchett $40,000.

In the Kilgore trial, all past and current electoral board members and State Board of Elections Secretary Susan Fitz-Hugh

agreed that a democrat could do no better job than a republican as general registrar. In McConnell's trial, the Democratic members attempted to show other reasons for McConnell's removal. In its special verdict, the jury rejected these arguments. The Lee County board members also affirmed that a democrat could do no better job than a republican as general registrar. Similarly, in Burchett's case, the Democratic registrar testifed unequivocally that political party affiliation was unnecessary for the effective performance of the assistant registrar.

Coupled with the political "firings" were issues of the defendants' qualifed immunity, the Commonwealth's eleventh amendment assertion and the state or local employment status of county electoral boards and registrars.

In memorandum opinions, District Court Judge Jackson Kiser affirmed the juries' awards and findings. See Kilgore v. McClelland, 637 F. Supp. 1241 (W.D. Va.

1985); Burchett v. Cheek, 637 F. Supp. 1249 (W.D. Va. 1985). In reaching his decision, Judge Kiser relied on this Court's ruling in Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 57 (1980). Judge Kiser recognized that the individual defendants did not enjoy qualified immunity because they failed to recognize this Court's rulings in Elrod and Branti. Kilgore, 637 F. Supp. at 1247. On the qualified immunity issue, the defendants presented no evidence in the district court to support a claim that they made the Branti "inquiry".

In a subsequent memorandum opinion, Judge Kiser recognized that the county electoral board members were "state" rather than "local" employees. Kilgore v. McClelland, 637 F. Supp. 1253, 1258 (W.D. Va. 1986). Prior to his decision, Kilgore and McConnell argued that electoral board members were state and local employees. Among other things, the State Board of Elections

coordinates electoral boards and the registrar, but the locality provides office space and furnishes office supplies and equipment. However, the locality fixes and pays the salary of the assistant registrar. See Va. Code §§ 24.1-45 and 24.1-45.1.

Judge Kiser recognized that the eleventh amendment usually bars monetary damages against the Commonwealth. Because the Commonwealth had purchased insurance for its employees, Judge Kiser ruled that the plaintiffs could recover from the Commonwealth's insurance carrier.

From these memorandum opinions, an appeal to the Fourth Circuit Court of Appeals followed. The Fourth Circuit affirmed the district court's ruling on the political discharges and followed the Court's Elrod/Branti reasoning. McConnell v. Adams, 829 F.2d 1319, 1324 (4th Cir. 1987). Even though this Court decided Branti three years prior to the wholesale dismissals in these cases, the Fourth Circuit reversed the

district court and allowed the individual defendants qualified immunity. The Fourth Circuit affirmed the "state" employee status of electoral boards and registrars. The circuit court then ignored the insurance coverage provided by the Commonwealth and held the eleventh amendment barred any recovery against the defendants in their official capacity.

Kilgore, McConnell and Burchett sought reconsideration of the damages issue in the circuit court. A panel of the circuit court denied their petition for rehearing on November 19, 1987.

REASONS FOR GRANTING THE WRIT

I.

INCONSISTENCY AND INJUSTICE HAVE RESULTED FROM THE FOURTH CIRCUIT'S USE OF THE ELEVENTH AMENDMENT TO DENY MONETARY RELIEF IN A SITUATION WHERE PUBLIC FUNDS ARE NOT DIRECTLY INVOLVED AND THE STATE BEING SUED ACQUIESCED TO A COURT'S RULING THAT MONETARY RELIEF WOULD BE AVAILABLE TO MAKE KILGORE, McCONNELL AND BURCHETT WHOLE IF THEY PREVAILED.

The Fourth Circuit's denial of the monetary relief awarded to Kilgore, McConnell and Burchett by each of the respective juries created a miscarriage of justice to each of them but more importantly caused a lack of uniformity in that court's decisions in these cases and among other courts. Both Kilgore and McConnell sought a preliminary injunction to restore them to their respective jobs pending a trial on the merits. The United States District Court for the Western District of Virginia denied this motion but certified the denial for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On April 1,

1982, a single judge of the Fourth Circuit heard this appeal.

In denying the request for a temporary injunction, that court found that Kilgore and McConnell would not suffer irreparable harm because back pay was recoverable if they prevailed on the merits. None of the defendants including the Commonwealth of Virginia objected or voiced any disagreement to the court's ruling that:

> [t]here is also no arguable question that the plaintiffs may not be made whole for whatever rights they may have lost due to their employment, such as salary and fringe benefits, should they ultimately prevail. They can be reinstated to the office if they prevail and whatever salary and fringe benefits they may have lost can be restored to them by a monetary judgment.

C.P.A. at A-6.

Relying on this precedent, Burchett chose not to seek a preliminary injunction.

This ruling directly conflicts with the later decision of the Fourth Circuit denying the monetary relief because of the

Commonwealth's eleventh amendment immunity. McConnell, 829 F.2d at 1328. Not only has it created a lack of uniformity in these cases and within the Fourth Circuit, it also fails to consider other courts' recognition that the eleventh amendment does not bar monetary relief when the public treasury is not directly involved.

The protection of the eleventh amendment can be lifted either by congressional abrogation or a waiver by the state being sued. Edelman v. Jordan, 415 U.S. 651 (1974). While courts have usually required a clear intent of waiver, "[t]he rationale for construing a waiver narrowly is to protect the state treasury, and when a state is insured against the loss from a claim, that rationale is attenuated." West v. Keve, 571 F.2d 158, 164 (3rd Cir. 1978). In distinguishing Edelman, the court in West noted that the state had not procured insurance to cover the loss in Edelman. Consequently that court remanded West to the

district court to determine if the loss was insured and if so, whether that waived the eleventh amendment immunity. On remand, the district court found that under the facts of that case no waiver occurred. West v. Keve, 541 F. Supp. 534 (D. Del. 1982).

In the present cases, the Commonwealth of Virginia purchased insurance with Compass Insurance Company to cover the loss. Thus the payment of the monetary relief awarded by the juries would not affect the state treasury.

The question of whether the public treasury would be tapped has been the deciding factor for several courts. For example, in Brewer v. Cantrell, 622 F. Supp. 1320, 1323 (W.D. Va. 1985), the court found that Virginia's unemployment compensation fund was separate from all public monies; therefore, "[t]his protects the general funds of the public treasury from liability on suits on unemployment claims. The eleventh amendment bars suits which would cause funds

to be paid out of the general treasury of a state." For similar reasons, the Fourth Circuit in Foremost Guaranty Corp. v. Community Savings & Loan, Inc., 825 F.2d 1383 (4th Cir. 1987), distinguished itself from its decision in John Hanson Savings & Loan v. Maryland, 812 F.2d 1401 (4th Cir. 1987) (per curiam unpublished). In its analysis, the court noted:

> [i]n John Hanson, we held that sovereign immunity protected MDIF from suit by two savings and loan associations seeking redemption of certificates of deposit representing their capital contributions to MDIF's Central Insurance Fund. Had the plaintiffs been allowed to proceed in that case and had prevailed, the judgment would have operated directly to require the disbursement of public funds. These circumstances clearly invoke the bar of the eleventh amendment.

Foremost, 826 F.2d at 1388. However in Foremost, the court reached a different result because "[i]n this case [Foremost] where MDIF is sued in its capacity as a conservator of Community Savings and Loan, MDIF's administration of public funds is not

implicated." Foremost, 826 F.2d at 1388.

The emerging trend in the law is further illustrated by the court's decision in Bennett v. White, 671 F. Supp. 343 (E.D. Pa. 1987). That court allowed the plaintiffs to recover money that the officials of the Pennsylvania Department of Public Welfare had wrongfully withheld. The court found that "[w]hile the eleventh amendment bars the payment of interest to plaintiffs, it certainly does not preclude the payment to plaintiffs of their money which the defendants withheld improperly." Bennett, 671 F. Supp. at 349. Yet, other courts have determined that the presence of insurance does not always waive eleventh amendment immunity even though it might waive a state's sovereign immunity. Gamble v. Florida Department of Health and Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986); South Dakota Board of Regents v. Hoops, 624 F. Supp. 1179 (D.S.D. 1986). It is apparent that courts are split in their decisions

about the bar of the eleventh amendment especially when public monies are not directly involved.

Another factor which supports the proposition that the Commonwealth believed it had waived its eleventh amendment immunity when it purchased insurance is the position it took at the hearing on the preliminary injunction for Kilgore and McConnell. At that hearing, the Commonwealth urged the court to deny the injunction and never objected to the court's ruling that Kilgore and McConnell could be made whole with back pay if they prevailed

This Court held in Toll v. Moreno, 458 U.S. 1 (1981), that representations made by a university at a hearing to stay the trial court's order pending appeal waived the eleventh amendment immunity. The university had indicated that it would make refunds of tuition if it lost on appeal. Normally, the eleventh amendment would bar such refunds. Likewise in Barnes v. Bosley, 625 F.Supp. 81

(E.D. Mo. 1985), the court found a waiver resulting from the defendants' statement in a memorandum that "[w]ith respect to plaintiffs' income and benefits, as shown by plaintiffs' complaint, their alleged injury can be calculated and compensated by money damages if they were successful on a case on the merits." Barnes, 625 F. Supp. at 86.

Therefore, Kilgore, McConnell and Burchett submit that these decisions result in confusion about the application of the eleventh amendment when public monies are not directly involved and when, with the presence of insurance coverage, a state urges denial of temporary reinstatement to former jobs since restoration of salary and fringe benefits would ultimately be available through a monetary award. Not only has the Fourth Circuit been inconsistent in this case, its decision ignores the concerns and trends of other courts when public monies are not directly involved. This situation begs for clarification and ultimate resolution by

this Court.

II.

THE FOURTH CIRCUIT ACKNOWLEDGED THE LEGAL PRINCIPLE ESTABLISHED IN BRANTI BUT FAILED TO FOLLOW IT BY GRANTING QUALIFIED IMMUNITY TO AN EMPLOYER WHO DID NOT EVEN RECOGNIZE BRANTI AND PRESENT EVIDENCE THAT PARTY AFFILIATION WAS NECESSARY FOR EFFECTIVE JOB PERFORMANCE.

In discussing qualified immunity, the Fourth Circuit indicated that "[c]learly a reasonable public official should have known that Branti established a rule protecting employees from discharge solely for patronage reasons unless party affiliation is a relevant job requirement." McConnell, 829 F.2d at 1325. Despite this recognition that Branti established the rule, the Fourth Circuit granted qualified immunity.

The proper inquiry is not whether there are cases with similar facts or the same job at issue but whether a rule of law by which to judge the unconstitutional conduct has been established, recognized and followed by

the courts. Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 80 (1982). During the relevant time period, all courts utilized Branti as the test by which to judge patronage dismissals.

For example, in Ness v. Marshall, 660 F.2d 517, 522 (3rd Cir. 1981), the court upheld a political firing of a city solicitor because his responsibilities were "so intimately related to city policy, and therefore politics was a necessary requirement." While discussing Ness, the court in Visser v. Magnarelli, 530 F. Supp. 1165 (N.D.N.Y. 1982), did not sanction the firing of a city clerk because the evidence demonstrated the duties of the clerk were mostly technical and thus party affiliation was not an appropriate requirement for effective job performance. The same kind of inquiry was made by the court in Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981), when it stated that "[t]he test is whether the position held by the individual

authorizes, either directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation." Even the Fourth Circuit in Delong v. United States, 621 F.2d 618 (4th Cir. 1980), utilized the Branti test. The common thread in all of these cases is that they judged the evidence presented against the requirement of Branti to determine if party affiliation was a necessary job requirement.

The sequential process that should be followed in using the Branti test is illustrated by the decisions in Gibbons v. Bond, 523 F. Supp. 843 (W.D. Mo. 1981), and in Brady v. Paterson, 515 F. Supp. 695 (N.D.N.Y. 1981). In Gibbons, the court found that "[h]aving failed to persuade the court that the plaintiffs were not terminated wholly because of their political affiliation, the defendants, in order to prevail in this action, must demonstrate that

political affiliation is an appropriate requirement for the effective performance of the job...." Gibbons, 523 F. Supp. at 851. Likewise, in Brady, the court held that "[i]n order to make out a prima facie case, plaintiff must still establish that the defendants' decision to replace him ... was based solely on partisan political considerations .... At that point, the burden shifts to defendants to prove that party affiliation is an appropriate requirement for the effective discharge of the office...." Brady, 515 F. Supp. at 699.

Despite all of these decisions that existed when Kilgore, McConnell and Burchett were wrongfully discharged, the Fourth Circuit allowed qualified immunity because of some supposed "small office" exception to Branti. This exception never existed. If Branti is properly applied, no constitutional violation occurs when party affiliation is necessary for effective job performance.

That, however, must be proven by evidence in the case. In the present cases, all the testimony at each of the trials established that party affiliation was not necessary for effective job performance.

The Fourth Circuit acknowledged that "public officers should not automatically receive qualified immunity simply because there is not a strict factual nexus between their actions and the precedent establishing the right allegedly violated." McConnell, 829 F.2d at 1325. Yet, it appears that the court considered a factual nexus to be important because of its discussion of Ramey v. Harber, 589 F.2d 758 (4th Cir. 1978), and the "factual distinctions between large and small offices." McConnell, 829 F.2d at 1325. Neither the Fourth Circuit or the employer in these cases should rely upon Ramey since Branti was decided after Ramey.

The Fourth Circuit acknowledged the legal principle governing patronage

dismissals but failed to follow the principle when it granted qualified immunity. Such an aberration must not be allowed to stand.

III.

THE FOURTH CIRCUIT INCORRECTLY HELD THAT VOTER REGISTRARS AND ASSISTANT REGISTRARS ARE STATE EMPLOYEES BECAUSE THE VIRGINIA GENERAL ASSEMBLY ESTABLISHED A BIFURCATED SYSTEM WHERE BOTH STATE AND LOCAL GOVERNMENTS EXERCISE CONTROL.

The Fourth Circuit held that because electoral boards and registrars bear a closer nexus to the state than the locality these jobs are state positions. McConnell, 829 F.2d at 1327. The court failed to address the question of whether an assistant registrar is considered a state or local employee. Because the evidence showed that a bifurcated system existed with both local and state governments exercising control, the state's insurance carrier and the county's insurance carrier should be held jointly and severally liable for the constitutional deprivations.

On the state level, Va. Code § 24.1-46

establishes the ministerial duties of the registrar. McConnell, 829 F.2d at 1327. The salary of the registrar is set by the state and reimbursed to the localities. Also, the State Board of Elections may remove the registrar. Va. Code § 24.1-19.

On the local level, the locality furnishes office space and supplies for the general registrar. Va. Code § 24.1-43. The primary control that the locality possesses centers around the office of assistant registrar. Va. Code § 24.1-45 requires the local governing body to fix the amount and pay the compensation of assistant registrars. The registrar decides who fills the assistant registrar's post and ultimately who receives locality funding for that position. Each locality implements and supports the registrar's decision by signing the paycheck.

The Fourth Circuit applied an employer-employee test to determine whether

the state or locality had control. McConnell, 829 F.2d 1328. Public servants such as a registrar and assistant registrar do not fit so tightly into such a rigid test. Even though the Commonwealth may be the "employer", these public servants act on behalf of the local citizens.

The Virginia General Assembly established a bifurcated system where the registrar and assistant registrar are not entirely controlled at the state or local level even though the locality has more direct control over the assistant registrar. This Court should recognize the importance of both the state and the locality with respect to registrars and assistant registrars and hold both the state and locality jointly and severally liable for the constitutional deprivations.

CONCLUSION

For the foregoing reasons, Cross-Petitioners Kilgore, McConnell and Burchett respectfully pray that the Cross-Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 83-8076

WILLIE B. KILGORE — PLAINTIFF-APPELLANT

v.

SUSAN H. FITZ-HUGH, SECRETARY STATE BOARD OF ELECTIONS, et al — DEFENDANTS-APPELLEES

DORIS McCONNELL — PLAINTIFF-APPELLANT

v.

SUSAN H. FITZ-HUGH, SECRETARY STATE BOARD OF ELECTIONS, et al — DEFENDANTS-APPELLEES

O R D E R

This case is before me as a single judge in accordance with the provisions of FRAP 8 as an exceptional case due to the requirements of time.

The plaintiffs, Willie B. Kilgore and Doris McConnell, filed their action against

the counties of Scott and Lee in Virginia, the Secretary of the State Board of Elections, and the members of the Electoral Boards of the said counties, contesting the fact of their non-reappointment by the electoral boards of the said counties. They claim that they were not reappointed as registrars of the said counties solely due to their political beliefs. They are of the Republican persuasion, while the majority of the electoral boards of the said counties are of the Democratic.

They also claim they are entitled to the offices by virtue of state law.

State statutes of Virginia with respect to the state laws are at least confusing. They require electoral boards to meet in the first week of March 1983 and every four years thereafter to appoint general registrars. § 24.1-43. The terms of office, however, of one member of each of the electoral boards, which consist of three persons, expired March 1, 1983, and that member, a Republican,

joined with the remaining Republican member of each of the two boards on March 1, 1983 and reappointed the plaintiffs to the office of registrar of the respective counties. See § 24.1-29. Thereafter, a Democrat was appointed to each of the electoral boards to replace the Republican whose term expired on March 1st, and that member of the board, together with the other Democratic member, appointed new registrars. The question under state law is who is entitled to hold the office, the old registrars or the new. The State Board of Elections is empowered to supervise and coordinate the work of the county and city electoral boards and to make such rules and regulations as will be conducive to the proper functioning of such electoral boards. § 24.1-19. Its secretary has advised the new registrars that they are entitled to the office, and she has so advised the counties of Scott and Lee which pay the salaries of the registrars subject to reimbursement by the Commonwealth. In two

opinions of the Attorney General concerning this dispute, on March 24, 1983, he advised the secretary of the State Board of Elections that the new registrars are entitled to the office under state law. On March 30, 1983, the plaintiffs filed their suit in the district court. On March 31st, the State Board of Elections filed a declaratory judgment action in the circuit courts of Scott and Lee counties, seeking a determination of who was entitled to the office under state law. So far as I am advised, no action has been taken by the state court until this time.

The new registrars' term of office begins on April 1, 1983. § 24.1-44. On March 31, 1983, the district court declined to grant a temporary restraining order maintaining the old registrars in office, and certified its denial for interlocutory appeal under 28 U.S.C. § 1292(b).

The plaintiffs filed their notice of appeal, and this date have filed a petition for an interlocutory appeal under 28 U.S.C. §

1292(b). They ask this court to treat the denial of the temporary restraining order as a denial of a temporary injunction so that the denial may be appealed as a matter of right under 28 U.S.C. § 1292(a)(1), or, in the alternative, they press their petition for an interlocutory appeal. In either event, they ask me for an injunction pending appeal.

The district court treated, and I think properly, its denial of a temporary restraining order as not being an appealable order. Drudge v McKernon, 482 F.2d 1375 (1973). There are some cases I am aware of which have held the denial or granting of temporary restraining orders to be appealable, but each of them I have found has in effect disposed of the merits of the case or has been such an order or denial as would make the question moot or as would serve to permanently deprive the moving party of a right or inflict irreparable injury on the moving party.

There is no claim here that the question will be mooted by the denial of temporary relief. There is also no question made or possible that the merits of the case are effectively decided by such denial. There is also no arguable question that the plaintiffs may not be made whole for whatever rights they may have lost due to their employment, such as salary and fringe benefits, should they ultimately prevail. They can be reinstated to the office if they prevail and whatever salary and fringe benefits they may have lost can be restored to them by a money judgment.

Upon argument, the plaintiffs also claim irreparable injury in the mere failure to reappoint them because of their political beliefs, taking the position that their First Amendment rights not to be denied reappointment solely because of their political persuasion must be preserved intact.

Treating the appeal as from a denial of

a temporary injunction, which I do not think is proper, I would yet deny an injunction pending appeal because I do not believe that the plaintiffs have shown that it is more likely that they will succeed on appeal. Federal Leasing v. Underwriters at Lloyds, 650 F.2d 495, 499 (4th Cir. 1981). I also do not think the mere fact that the plaintiffs have been deprived of their office is enough to show irreparable harm to them when they may be reinstated in the office and obtain a money judgment for any pecuniary loss they may have suffered. The public interest, it is true, does require a continuous efficient operation of a registrar's office, and the plaintiffs say that the interruption and disruption caused by change of management is not in the public interest. Yet the plaintiffs do not claim that the new registrars will not register anyone entitled so to register or that anyone presently registered will be unlawfully removed from the registration books. That being true, I

think the management of the internal affairs of the office are up to the registrar subject only to any constitutional or statutory limitation. There is no likelihood of harm to the defendants if the temporary injunction is granted, for like the plaintiffs, I think they would be entitled to any pecuniary benefits they might have been deprived of by temporary relief.

While I do believe that the plaintiffs have an arguable case on the merits, the little likelihood of irreparable harm to them if temporary relief is denied, the fact that I consider the merits of the case to be an open questions under Elrod v. Burns, 427 U.S. 347 (1976), and the cases which have followed it, and the fact that I believe that the public interest has not been shown to be affected one way or the other to any great extent by the change in registrars, I believe the balance of hardship test of Blackwelder Furniture Company v. Seilig Manufacturing Company, 550 F.2d 189 (4th Cir. 1977), weighs

in favor of the defendants. The defendants are supported by administrative acts of the secretary of the State Board of Elections as well as an opinion of the Attorney General construing state law. While the matter of state law has not been decided by any court, the administrative acts of the state authorities administering the law and the Attorney General's opinion are entitled to some weight in my consideration. That being true, when I take into consideration the fact that I think the plaintiffs' right of action is at best an open question, I would deny the relief requested whether it be as an injunction pending appeal from the denial of a temporary injunction or from an injunction pending a discretionary appeal under 28 U.S.C. § 1292(b). I think it is of no moment that the district court was not applied to for temporary relief under FRAP 8 since it did not treat the order as appealable.

The parties will submit simultaneous memoranda with respect to whether or not an

interlocutory appeal should be granted, on or before April 8, 1983.

The plaintiffs were represented at this hearing by Gary Bradshaw, Esquire, Joseph Wolfe, Esquire, and William Hurd, Esquire. The counties and the electoral boards were represented by James P. Jones, Esquire, and the State Board of Elections was represented by Karen Gould, Esquire, who did not appear because her aircraft could not land at the local airports. She, however, gave her position in the case to me by telephone.

Each of the parties objected to all of the rulings I have made adverse to him for every reason which might be supported by the record.

It is accordingly ADJUDGED and ORDERED that an injunction pending appeal shall be, and the same hereby is, denied.

This 1st day of April, 1983.

/s/ H. E. Widener, Jr.
U. S. Circuit Judge

The plaintiff having been advised of the

contents of this order requested permission to withdraw their appeal and their petition for appeal, which was granted.

This 1st day of April, 1983.

/s/ H.E. Widener, Jr.
U. S. Circuit Judge

CONSTITUTION OF THE UNITED STATES
AMENDMENT XI
[RESTRICTION OF JUDICIAL POWER]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

VA. CODE § 24.1-19 - POWERS AND DUTIES IN GENERAL - The State Board of Elections shall so supervise and coordinate the work of the county and city electoral boards and of the registrars as to obtain uniformity in their practices and proceedings and legality and purity in all elections. It shall make such rules and regulations not inconsistent with law as will be conducive to the proper functioning of such electoral boards and registrars. It may institute proceedings for the removal of any member of the electoral board or other election official who fails to discharge the duties of his office in accordance with law. The Board may remove from office any registrar upon notice, who fails to discharge the duties of his office according to law. The Board may also file either a writ of mandamus or prohibition which writs will lie for the purpose of fulfilling the requirements of § 24.1-76 or § 24.1-165. (Code 1950, §§ 24-25, 24-345.11;

1952, c. 509; 1970, c 462; 1973, c 30; 1975,c 515.)